

Malayan Banking Bhd v Mohd Bahari bin Mohd Jamli @ Mohd Jamal A

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-10 OF 1997

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA B

31 JULY 2003

Labour Law — Industrial Court — Jurisdiction — Reference under s 20(3) of the Industrial Relations Act 1967 — Whether jurisdiction of Industrial Court could be challenged without challenging the Minister's reference — Whether the threshold jurisdiction of the Industrial Court could be challenged by way of a preliminary objection C

Labour Law — Industrial Court — Jurisdiction — Whether the fact that the Industrial Court at the end of an inquiry may not or cannot make an order of reinstatement ousted its jurisdiction to proceed with the inquiry — Whether Industrial Court has ample power to make an order of compensation in lieu of reinstatement D

The Minister of Human Resources ('Minister') referred the respondent's representation to the Industrial Court ('the IC') pursuant to s 20(3) of the Industrial Relations Act 1967 ('the Act'), arising out of the respondent's dismissal by the appellant. When the case came up for hearing before the IC, it was informed that the respondent was an undischarged bankrupt and that the official assignee's ('OA's') consent had not been obtained to enable the respondent to continue with the proceedings. The appellant's counsel applied for the respondent's case to be dismissed on two grounds. Firstly, that it would be inequitable to delay the hearing to wait for the OA's consent. Secondly, s 56 of the Banking and Financial Institutions Act 1989 ('BAFIA') prohibited the appellant from employing a bankrupt. Thus, argued counsel, the respondent's claim for reinstatement under s 20 of the Act could not be entertained by the IC. The IC ordered the case to be struck out 'with liberty'. The OA subsequently gave consent and upon application by the respondent the case was restored. However, at the outset of the hearing, the appellant's counsel raised a preliminary objection, again on the same ground under s 56 of the BAFIA. The IC however in an award held that it had the jurisdiction to enquire into the dispute and to determine whether the dismissal of the respondent was without just cause or excuse and ordered that an early hearing date be fixed. The appellant thereafter applied to the High Court for certiorari to quash the IC's award and prohibition to prohibit the IC from proceeding further to hear the case. The High Court dismissed the application and the appellant thus appealed to the Court of Appeal. E

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Held, dismissing the appeal with costs: I

- (1) In the instant case, the inquiry before the IC had not even started yet and the challenge to its jurisdiction was therefore of the

- A ‘threshold jurisdiction’ type. However the challenge was made by way of a preliminary objection in the IC. There was no application to the High Court to quash the reference made by the Minister. On the authorities of *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 and *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 alone, the appeal ought to be
- B dismissed (see p 439E–F); *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 and *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 followed.
- (2) The Court of Appeal would agree with the High Court that the case of *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1
- C MLJ 230 was distinguishable from the present case. In *Holiday Inn*, the prayer for reinstatement was abandoned and only a claim for damages was left. In the present case, the prayer for reinstatement still subsisted, even though the IC could only award compensation if successful. Further, in *Holiday Inn*, the challenge was of the ‘*Anisminic* jurisdiction’ type and not the ‘threshold
- D jurisdiction’ type as in the present case. The Court of Appeal would also agree with the High Court’s decision that the fact that the IC at the end of the inquiry may not or cannot make an order of reinstatement does not oust the IC’s jurisdiction to proceed with the inquiry. The IC has ample power to make an order of compensation in lieu of reinstatement. The primary issue for the
- E IC’s determination is not whether reinstatement may be ordered but whether the respondent was dismissed without just cause or excuse (see pp 435H–I, 440A–B); *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230 distinguished; *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 referred) and *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 followed.
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[Bahasa Malaysia summary]

- G Menteri Sumber Manusia (‘Menteri’) telah merujuk kepada representasi responden kepada Mahkamah Perusahaan (‘MP’) menurut s 20(3) Akta Perhubungan Perusahaan 1967 (‘Akta tersebut’), yang timbul daripada pemecatan responden oleh perayu. Apabila kes tersebut didengar di hadapan MP, adalah dimaklumkan bahawa responden adalah seorang bankrap yang belum dilepaskan dan bahawa persetujuan pegawai pemegang harta (‘PPH’) tidak diperolehi untuk membolehkan responden meneruskan prosiding. Peguam perayu telah memohon agar kes ditolak atas dua alasan. Pertama, bahawa ia adalah tidak saksama untuk melengahkan perbicaraan tersebut untuk menunggu persetujuan PPH. Kedua, s 56 Akta Bank dan Institusi-Institusi Kewangan 1989 (‘BAFIA’) melarang perayu daripada mengambil seorang bankrap untuk bekerja.
- H Oleh itu, hujah peguam, tuntutan responden untuk pengembalian jawatan di bawah s 20 Akta tersebut tidak dilayan oleh MP. MP telah memerintahkan kes tersebut dibatalkan ‘with liberty’. PPH
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kemudiannya telah memberikan persetujuan dan atas permohonan oleh responden kes tersebut dikembalikan. Namun begitu, pada permulaanya perbicaraan tersebut, peguam perayu telah menimbulkan satu bantahan awal, sekali lagi atas alasan yang sama di bawah s 56 BAFIA. MP bagaimanapun dalam memberikan award telah memutuskan bahawa ia mempunyai bidang kuasa untuk menyiasat pertikaian tersebut dan untuk menentukan sama ada pemecatan responden adalah tanpa sebab atau alasan yang adil dan memerintahkan satu tarikh perbicaraan awal ditetapkan. Perayu kemudiannya telah memohon ke Mahkamah Tinggi untuk certiorari bagi membatalkan award MP tersebut dan larangan untuk melarang MP daripada terus mendengar kes. Mahkamah Tinggi telah menolak permohonan tersebut dan perayu dengan itu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut dengan kos:

- (1) Dalam kes semasa, siasatan di hadapan MP belumpun bermula dan cabaran terhadap bidang kuasanya adalah jenis 'threshold jurisdiction'. Bagaimanapun cabaran tersebut telah dibuat melalui satu bantahan awal di MP. Tiada permohonan ke Mahkamah Tinggi untuk membatalkan rujukan yang dibuat oleh Menteri. Berdasarkan autoriti-autoriti *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 dan *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 dengan sendirinya, rayuan tersebut patut ditolak (lihat ms 439E-F); *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 dan *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 diikuti.
- (2) Mahkamah Rayaun akan bersetuju dengan Mahkamah Tinggi bahawa kes *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230 adalah berbeza daripada kes semasa. Dalam *Holiday Inn*, permohonan untuk pengembalian jawatan telah diabaikan dan hanya tuntutan ganti rugi yang tinggal. Dalam kes semasa, permohonan untuk pengembalian jawatan masih wujud, walaupun MP hanya boleh mengawardkan pampasan jika berjaya. Tambahan pula, dalam *Holiday Inn*, cabarannya adalah jenis 'Anismenic jurisdiction' dan bukan jenis 'threshold jurisdiction' seperti dalam kes semasa. Mahkamah Rayuan juga bersetuju dengan keputusan Mahkamah Tinggi bahawa hakikat bahawa MP di akhir siasatan mungkin tidak boleh dan tidak boleh membuat satu perintah pengembalian jawatan tidak menyingkirkan bidang kuasa MP untuk meneruskan siasatan tersebut. MP mempunyai kuasa yang mencukupi untuk membuat satu perintah pampasan untuk menggantikan pengembalian jawatan. Persoalan utama yang perlu ditentukan oleh MP adalah bukan sama ada pengembalian tersebut boleh diperintahkan tetapi sama ada responden telah ditolak tanpa sebab atau alasan yang adil (lihat ms 435H-I, 440A-B); *Holiday Inn, Kuching v Lee*

- A** *Chai Siok Elizabeth* [1992] 1 MLJ 230 dibeza; *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 referred) dan *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 diikut.]

Notes

- B** For cases on the jurisdiction of the Industrail Court, see 8 *Mallal's Digest* (4th Ed, Reissue) paras 1248–1298.

Cases referred to

- C** *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 (refd)
Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (folld)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (folld)
- D** *Holiday Inn, Kuching v Lee Chai Siok, Elizabeth* [1992] 1 MLJ 230 (distd)

Legislation referred to

- Banking and Financial Institutions Act 1989 s 56
- E** Industrial Relations Act 1967 s 20 (3)
- TM Varughese (TM Varughese & Co)* for the appellant.
P Kuppusamy (P Kuppusamy & Co) for the respondent.

- F** **Abdul Hamid Mohamad JCA** (delivering judgment of the court):

On 21 May 1993 the Minister of Human Resources referred the representation made by the respondent to the Industrial Court pursuant to s 20 (3) of the Industrial Relations Act 1967 arising out of the dismissal of the respondent by the appellant on 19 November 1991. When the case came up for hearing before the Industrial Court, the court was informed that the respondent was an undischarged bankrupt and that the consent of the official assignee had not been obtained to enable the respondent to continue with the proceedings. Learned counsel for the appellant applied for the claim of the respondent to be dismissed primarily on two grounds. First, it would be inequitable to delay the hearing further to wait for the sanction of the official assignee. Secondly, under s 56 of the Banking and Financial Institutions Act 1989 ('BAFIA') the appellant was prohibited from employing a bankrupt. For that reason, learned counsel for the appellant submitted that the respondent's claim for reinstatement under s 20 of the Industrial Relations Act 1967 cannot be entertained by the Industrial Court. The court was however of the view that it would be inequitable to dismiss the claim without affording the respondent an opportunity to present his case. The court, by an Award No 272 of 1994 ('the first award') ordered the case to be struck out 'with liberty'.

On 13 July 1994, the official assignee granted the respondent the necessary sanction. Upon the application by the respondent, the Industrial Court ordered the proceeding to be restored.

But, at the outset of the hearing the learned counsel for the appellant raised a preliminary objection, again on the same ground under s 56 of BAFIA.

The Industrial Court, by an Award No 486 of 1994 ('the second award'), held that it had jurisdiction to enquire into the dispute and to determine whether the dismissal of the respondent was without just cause or excuse and ordered that an early date be fixed for the hearing of the case. The award, *inter alia*, said:

The intention of the IRA is to regulate the relations between the employer and the employee and its policy and object to settle trade disputes. No workman should be condemned to a dismissal without being heard simply because the Court could not grant him his specific relief prayed for under section 20(3). It is premature at this stage to decline to hear this dispute and make an Award. It is imperative the Court hears all the evidence rather than taking a short cut based on statutory interpretation.

A careful perusal of section 30 subsections (1), (5) and (6) clearly expresses that the provisions section 30 applies to matters of reference under Section 20(3).

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Even assuming an award in favour of the Claimant has to be made at the end of the day, "the Court shall not be restricted to the specific relief claimed, but must in the case of representations for reinstatement under section 20(1) where reinstatement is not an appropriate remedy, order compensation in lieu of reinstatement.

The appellant applied to the High Court for an order of certiorari and prohibition, i.e. to quash the second award and to prohibit the Industrial Court from proceeding further to hear the case. The High Court dismissed the appellant's application. The appellant appealed to this court. This court dismissed the appeal with costs.

Before the learned judge (as he then was), it was argued that since the primary remedy under s 20(1) was reinstatement and since reinstatement was impossible in view of s 56 of BAFIA, the jurisdiction of the Industrial Court to inquire into the dispute was ousted. The case of *Holiday Inn, Kuching v Lee Chai Siok, Elizabeth* [1992] 1 MLJ 230 was cited.

The learned judge (as he then was) dismissed the argument. First, he noted that the learned counsel for the appellant conceded that if the Industrial Court had jurisdiction to inquire into the case, the court had jurisdiction to make a finding whether the respondent's dismissal was without just cause or excuse and to order compensation in lieu of reinstatement under certain circumstances.

A Secondly, the learned judge (as he then was) distinguished *Holiday Inn, Kuching* on the basis that in the present case the respondent had never abandoned his claim for reinstatement.

The learned judge (as he then was) proceeded:

B In any event, we have yet to hear his evidence but for this challenge over the threshold jurisdiction of the applicant. If not been (sic) for this objection and the hearing proceeded it may transpire that on the evidence before the Industrial Court the applicant may be able to discharge its burden that the dismissal of the applicant was with just cause or excuse. In which event, the issue of reinstatement would not arise. Even if the decision of the Industrial Court after the hearing is that the dismissal was without just cause and excuse and by the primary remedy under section 20 of the 1967 Act, there would be a case for reinstatement but circumstances and reasons by virtue of section 56 of the 1989 Act the Industrial Court may exercise its discretion in not ordering reinstatement but instead to make an award for compensation in lieu of reinstatement as it is within its powers to do so under section 30(6) of the 1967 Act. However, before all these the applicant chose to challenge the threshold jurisdiction of the Industrial preventing it even from enquiring into the merit of the case.

Before us, the learned counsel for the Appellant actually had nothing to add to his earlier submission in the High Court. He relied on s 20 of the Industrial Relations Act 1967, s 56 of BAFIA and *Holiday Inn Kuching* and submitted:

F It is respectfully submitted that the Industrial Court has no jurisdiction to hear the Claimant's case under section 20(3) of the Industrial Relation's Act 1967 which is specifically for reinstatement only. Reinstatement is statutorily prohibited under BAFIA. Thus his remedy ought to be in Civil Court.

G Learned counsel for the respondent submitted that under the Industrial Relations Act 1967, a dispute on jurisdiction occurs at two stages in proceedings before the Industrial Court. The first stage is at the initial stage affecting the hearing of the reference or the complaint itself when the reference is made by the Minister. The second stage is at the final stage affecting the award. He cited *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 (S C) , *Kathirvelu Ganesji & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 (S C) .

H These two judgments of the Supreme Court are binding on this court. The law has been stated very clearly in the two cases.

In *Enesty Sdn Bhd* [1986] 1 MLJ 18 at p 21, Mohamed Azmi SCJ, delivering the judgment of the Supreme Court said:

I Under the Industrial Relations Act, 1967, a dispute on jurisdiction can occur at two stages in proceedings before the Industrial Court. The first is at the initial stage affecting the hearing of the reference or complaint itself when reference is made by the Minister under sections 20(3), 26(1) or when a

complaint is made under section 56(1); and second is at the final stage affecting the award. In this context, it is appropriate to distinguish the two jurisdiction exercisable by the Industrial Court as jurisdiction to hear the reference, ie jurisdiction to enter on an inquiry as opposed to jurisdiction to hear the reference on its merits which in effect is jurisdiction to make a particular order, decision or award. As stated by Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* at p 171, 'But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.' The Federal Court had recognised this distinction in dealing with the matter in two separate appeals arising from the case of Dr A Dutt — in upholding the decision of the High Court to hear a reference made by the Minister. This is the 'jurisdiction in the narrow and original sense' referred to by Lord Reid at page 171 in *Anisminic's* case, ie narrow and original sense of the tribunal being entitled to enter into the inquiry in question.

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In *Kathiravelu Ganesan*, Gopal Sri Ram (JCA) delivering the judgment of the Supreme Court further clarified the position under the heading 'Threshold and Animistic Jurisdiction: General'. The learned judge said, at pp 692–693:

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At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed 'threshold jurisdiction' in recognition of a public decision-maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.

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The latter class concerns jurisdiction in the wider sense and is generally called '*Anisminic* jurisdiction', named after the landmark decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2AC 147, a case that was to have a profound effect upon the subject of administrative law. It refers to cases where a public decision-maker, having threshold jurisdiction 'misconducts' himself in such a fashion as to exceed his decision-making jurisdiction.

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At p 697:

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The essence of his Lordship Mohd Azmi J's decision, which was affirmed by the Federal Court and with which we express our unqualified agreement, is that the threshold jurisdiction of the Industrial Court may be only questioned by challenging the Minister's reference. It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that court. In other words,

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- A the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him.

- B We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

And, at p 699:

- C It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where D a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as E preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

- F Coming back to the present case. The inquiry has not even started yet. So, the challenge to jurisdiction of the Industrial Court is of the type termed as the 'threshold jurisdiction'. But the challenge was made by way of a preliminary objection, in the Industrial Court. There was no application to the High Court to quash the reference made by the Minister. On these two authorities alone the appeal should be dismissed.

- G We now come to the ground for the objection. Simply put, the ground is that since the respondent is claiming reinstatement and since reinstatement is not possible because the respondent is a bankrupt, therefore the Industrial Court has no jurisdiction to inquire into the complaint.

- H On this issue, we agree with the learned judge of the High Court (as he then was) that the case of *Holiday Inn, Kuching* is distinguishable from the present case. In that case the prayer for reinstatement having been abandoned, what was left was only a claim for damages. In the present case, the prayer for reinstatement still subsists, even though if successful, the Industrial Court may only award compensation. Furthermore, we would like to add that in that case the challenge was against the award after a full inquiry and in which a sum of RM49,005 was awarded in respect of backwages and compensation in lieu of reinstatement. So, the challenge for jurisdiction I is of the second type, not the 'threshold jurisdiction' type. (We would however like to make it clear that we do not in this appeal give any view whether *Holiday Inn, Kuching* was rightly decided or not) .

Secondly, we also agree with the learned judge of the High Court (as he then was) in this appeal that the fact that the Industrial Court, at the end of the inquiry may not or cannot make an order of reinstatement does not oust the Industrial Court's jurisdiction to proceed with the inquiry. The court has ample power to make an order of compensation in lieu of reinstatement. The primary issue for the determination of the Industrial Court is not whether reinstatement may be ordered or not but whether the respondent was dismissed without just cause or excuse. That is the primary issue that the Industrial Court has to decide and it can only decide after a full inquiry. Whatever remedy that the respondent may be entitled to will follow from that finding.

It is trite law that the Industrial Court has power to make an order of compensation in lieu of reinstatement: In *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96, Mohamed Azmi J (as he then was) said, at p 97:

If the court decides he has been dismissed without just cause or reason, the court will proceed to make an 'award' which under section 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the matter referred to it.

And again, at letter 'E', right hand column:

In lieu of reinstatement the Industrial Court can award compensation.

This judgment of Mohamed Azmi J (as he then was) was affirmed by the Federal Court in *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115 and also received an 'unqualified agreement' from the Supreme Court (through Gopal Sri Ram JCA) in *Kathiravelu Ganesan*.

In the circumstances, we agreed with the judgment of the learned judge (as he then was) and dismissed the appeal with costs. We also directed the Industrial Court to proceed with the inquiry and the deposit to be paid to the respondent towards taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon

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